THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Debra R. McCaslin, Circuit Judge

Case No. 2022-001655

James Marshall Shoemaker, III.....Appellant,

v.

Lesley R. Moore, Esq. as Personal Representative and Trustee, Edward Sloan Shoemaker and Jonathan Evans Shoemaker..... Respondents.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the Lower Court err in granting Respondents' Motion to Dismiss where Appellant was procedurally denied his right to move for reinstatement upon good cause shown and where the Lower Court failed to even consider the SCACR Rule 260(a), the most critical rule governing a dismissal and reinstatement analysis?

2. Did the Lower Court Judge err in affirming the Probate Judge's grant of summary judgment and his refusal to vacate such rulings/orders despite the fact that the Probate Judge was in a mutually beneficial pecuniary relationship with Respondents' law firm which under the applicable Canons of Judicial Conduct required his recusal and/or remittal of his substantial conflict of interest and appearance of impropriety, all of which the Probate Judge failed to do, when he

3. Did the lower court err in affirming summary judgment in favor of Respondents where Appellant's affidavit from Doctor Thomas Hughes M.D. created a dispute of material fact as to the decedent's legal competency to create a validly executed last will and testament and/or trust?

STATEMENT OF THE CASE

This is an action between siblings in which Appellant has contested the validity/enforceability of his deceased Father's will/trust(s). Appellant's contest is largely based upon undue influence claims against his siblings and correspondingly the mental incapacity of his father. It is undipusted that the most critical disputed fact in this case is whether the father of these siblings had the requisite legal capacity to execute a binding testamentary document at the time of execution. The Respondents ultimately moved for Summary Judgment, and Judge Clayton L. Jennings, Associate Probate Judge, heard the motion on April 7, 2021, granting summary judgment to Respondents on April 22, 2021, which essentially was a $4 million dollar loss to Appellant and a $4 million dollar victory to the Respondents. Probate Judge Jennings primarly ruled as he did by ruling that Appellant's affiant, a physician who evaluated the medical records of the decedent, stated his opinion insufficiently and that his directly opposing factual determination from Respondents' affiants did not indicate a dispute of material fact (on the MOST critical fact in the case).

The Order granting summary judgment was issued on June 15, 2021. On September 16, 2021, Judge Jennings disclosed to the parties via email that he had an ongoing business and financial relationship with the Respondents' law firm, Brown, Massey, Evans, McLeod & Haynsworth, LLC, serving as co-counsel with named partner Stanley McLeod. He further stated the relationship had begun in April the exact same day as the summary judgment hearing. Upon receipt of the September 16 email, Appellant's counsel drafted and filed a Motion to Vacate and to Recuse based upon the direct conflict of interest under which Judge Jennings was operating at the summary judgment hearing, a relationship which was not disclosed until over five months later (well after Stanley McLeod's firm was granted summary judgment in the case). Judge Jennings denied the Motion to Vacate his Order Granting Summary Judgment but did very strangelyl recuse himself from any further involvement (why would he recuse himself at that point and not vacate previous orders when the precise recusal-worthy conflict existed at that time?). This appeal followed.

The underlying case and its merits bear little relation to the primary issue before this Court, which is the issue of the trial judge failing to fulfill mandates of the Code of Judicial Conduct, namely Canon 2A and B, Canon 3(E)(1) and 3(F), that he failed to apply the appropriate standard of review for summary judgment, and that the Lower Court failed to apply correct law to allowing Appellant an opportunity to continue reinstated in this case.. However, on the issue of the sufficiency of the Appellant's physician's affidavit insofar as to create a material dispute of fact, background recapitulation is also called for.

Background Facts

The case before the Court derives from a Probate case involving the estate of decedent James Marshall Shoemaker, Jr. ("Father"). Father's children, the Appellant James Marshall

Shoemaker, III ("Appellant"), and the Respondents, Edward Sloan Shoemaker, Jonathan Evans Shoemaker, and Mary Hunter Sloan Shoemaker ("Siblings'). Father's wife Polly, Mother of all the children, has also passed away, and her estate is also in controversy between the same parties, but it is not before the Court in this appeal (It remains in Probate Court with motions pending, but the case is very similar in both grounds alleged by Appellant and defenses raised by the Siblings).

Between Father and Mothers' respective estates and trusts, a very substantial sum exists for distribution, somewhere between $9-$11 million. The relationship history between Appellant and his siblings may be characterized as strained at best, and directly adversarial at worst. Appellant brought two cases in Probate Court contesting the current wills/trusts of his parents, wherein his parents had changed their testamentary devisees to include only 2 sons instead of 3, where all 3 had previously been sharing in the estates equally. These changes occurred during periods of cognitive impairment of both parents, and that impairment and thus legal capacity to validly create testamentary documents (or edit them) rendered any changes invalid. The issue of mental capacity thus necessarily created the need for investigation and medical opinion as to his capacity, because whether the father had the legal capacity to execute his testamentary documents validly is THE material fact in this case, and it is hotly disputed.

Further and exceptionally important facts to this appeal relate to the violations of the judicial canons that occurred at the Probate Court level, and which the Circuit Court disregarded as either meaningless to the case or that his serving as judge was perfectly proper. The Siblings are represented by the law firm of Brown, Massey, Evans, McLeod & Haynsworth, LLC, a firm with whom Judge Jennings was working with as co-counsel on two cases since April 7, 2021. A

bullet-listed timeline of events is herein provided. The timeline alone shall provide this Honorable Court the most succinct yet clear progression of undisputed factual events:

- April 7, 2021 – Judge Jennings hears Brown, Massey, Evans, McLeod & Haynsworth, LLC's Motion for Summary Judgment on behalf of the Siblings. The transcript of the hearing on page indicates Judge Jennings' inclination to grant Summary Judgment on issue of undue influence, but takes under advisement (Exhibit A, p. 33, line 23-p. 34, ln 2).
- April 7, 2021 – Judge Jennings files a Notice of Appearance in two civil lawsuits as co-counsel with the firm of Brown, Massey, Evans, McLeod & Haynsworth, LLC. (Exhibit B, page 1 – Judge Jennings' Order dated December 15, 2021)
- April 7, 2021 – Judge Jennings makes no mention of any relationship with Brown, Massey firm and even if there had been mention of any relationship (See Exhibit A) (Exhibit C – Email from Judge Jennings to all parties dated September 16, 2021).
- June 15, 2021 – Judge Jennings grants Brown, Massey, Evans, McLeod & Haynsworth's Motion for Summary Judgment. (Exhibit D – Order Granting Respondent's Motion for Summary Judgment). This Order ended Appellant's case and declared victory for Brown, Massey, Evans, McLeod & Haynsworth's clients, a victory worth millions of dollars. An Amended Order Granting Summary Judgment to Respondents was later issued December 15, 2021. (Exhibit E).
- September 15, 2021 – Judge Jennings hears Brown, Massey, McLeod, Evans & Haynsworth motion in which the firm sought award of $108,167.50 in attorney's fees and $4342.75 in costs, for a total of $112,510.25 in fees and costs. Judge Jennings takes these motions under advisement. (Exhibit F – Notice of Motion and Motion for the

Recovery of Costs and Attorney's Fees, filed June 18, 2021). To date, this motion remains undecided.

- September 16, 2021 – Prior to any ruling on the Motion to Amend or the Motion to award $112,510.25 in attorney's fees to the Brown, Massey firm, Judge Jennings emails all counsel and reveals for the first time that he has been in business as co-counsel with the Brown Massey firm since April 2021; in fact, his relationship with the firm began the same day as the Summary Judgment hearing, April 7, 2021. This disclosure was 5 ½ months after his co-counsel relationship with the Appellant's opposing firm began. (See Exhibit C).
- October 1, 2021 – Appellant files his Motion to Recuse and Vacate, seeking Judge Jennings' recusal and that he vacate his Order Granting Summary Judgment. (Exhibit G).
- December 15, 2021 - Judge Jennings grants Appellant's Motion to Recuse but denies the Motion to Vacate previous Orders; therefore, co-counsel Brown, Massey, Evans, McLeod & Haynsworth maintained its victory in the case, but the Judge recused himself for further involvement for the sake of avoiding any appearance of impropriety (incongruent and mutually exclusive dual rulings). (Exhibit H).
- February 1, 2022 – Chief Justice of the South Carolina Supreme Court, Donald W. Beatty, disqualified all Greenville County Probate Judges from the Shoemaker cases and appointed Judge Joshua Queen of Cherokee County to handle all matters moving forward. (Exhibit I).

STANDARD OF REVIEW

When reviewing the trial court's decision to grant summary judgment, an appellate court applies the same standard applied by the circuit court. Lanham v. Blue Cross & Blue Shield of

S.C., Inc., 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002). Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party is entitled to prevail as a matter of law. Rule 56(c), SCRCP; Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). "In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the nonmoving party." David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006).

"In determining whether any triable issues of fact exist, the court should construe all ambiguities, conclusions, and inferences arising from the evidence most strongly against the moving party. Even when there is no dispute as to evidentiary facts, but only as to conclusions or inferences to be drawn from them, summary judgment should be denied. It is dependent upon the existence of plain and undisputable facts upon which reasonable minds cannot differ." Allen v. Long, 332 S.C. 422, 426, 505 S.E.2d 354, 356 (Ct. App. 1998) (internal citations omitted).

Therefore, the *only* way summary judgment can be granted is if:

1) it is *clear* that there is *no* genuine issue of material fact; *and*

2) the moving party is entitled to judgment as a matter of law.

From this two-prong requirement, the Allen standard provides further instruction upon how to determine whether there are triable issues of fact under the first prong:

All 1) ambiguities, 2) conclusions, and 3) inferences from the record are to be construed most strongly against the moving party (the Plaintiff/Third-party Defendant in this case). Last, the moving party must show plain and undisputable facts upon which reasonable minds cannot differ. Summary judgment is a strong burden to overcome by a moving party.

Applying the appropriate standard of review to the facts and issues before this Court, Appellants would show that the lower court failed to appropriately apply this critical standard of review and summary judgment must be reversed.

ARGUMENT

1. **The Lower Court erred in granting Respondentss Moton to Dismiss the Appeal because Mr. Shoemaker was denied all procedural protections, the court failed to follow the mandated rules governing dismissal, and the Lower Court completely failed to consider or even recognize that dismissals could be reinstated under appellate court rules upon good cause shown.**

Under South Carolina Appellate Court Rule 260(a), "Whenever it appears that an appellant or a petitioner has failed to comply with the requirements of these Rules, the clerk shall issue an order of dismissal, which shall have the same force and effect as an order of the appellate court. A case shall not be reinstated except by leave of the court, upon good cause shown, after notice to all parties. The clerk shall remit the case to the lower court or administrative tribunal in accordance with Rule 221 unless a motion to reinstate the appeal has been actually received by the court within fifteen (15) days of filing of the order of dismissal (the day of filing being excluded)."

In other words, Rule 260 SCACR, if we reinterpret the quoted language, it reads as follows: The clerk of court SHALL dismiss an appeal if it is untimely; however, the parties shall be provided notice, and the Appellant whose case was dismissed based on untimeliness shall have 15 days to move for reinstatement, and the appellate court may reinstate the appeal upon good cause shown. Therefore, there is absolutely no doubting the conclusion that Mr. Shoemaker was entitled to an opportunity to be reinstated if he could show good cause, and that would only be necessary if the clerk had dismissed the appeal as required by law (which didn't happen).

The lower court flatly failed at appropriately analyzing the law. The lower court simply ruled as follows: 1) the appellant was later than 10 days in filing; 2) there is no overcoming the dismissal under the strictly applied statute; and 3) therefore, the appeal was dismissed. This reasoning is fatally flawed by the clear language of the Appellate Court Rule.

However, the Lower Court's analysis was fatally flawed because it ignored Rule 260 SCACR. Had the Lower Court applied the correct analysis, then the syllogism would have gone as follows: 1) A 10 day appeal deadline is immoveable; 2) failure to timely file requires the clerk to dismiss the appeal and notify the parties; 3) the dismissed party then has 15 days to move fore reinstatement, and 4) the appellate court can reinstate the appeal based on good cause shown.,

The Lower Court completely failed to recognize that even a dismissed appeal could be reinstated upon showing of good cause, and Appellant offered substantial evidence at the hearing that would clearly satisfy any good cause standard applied by the courts of South Caroilna. He was met with disregard despite appellate rules requiring such consideration.

All the above stated, let us turn to a good cause analysis, which though the Lower Circuit heard from Appellant's attorney, gave no consideration to such facts. Under Rule 260(a), as applied to the facts, the following are true:

Unbeknownst to Appellant, almost precisely at the time his Notice of Appeal was due, his attorney of record was suspended and later disbarred and he was prevented from any further practice of law right at the time such notice of appeal would have been due. The deadline for the Notice of Appeal was December 26, 2021, and again, unbeknownst to Appellant, his lawyer was suspended from practice by Order of the Supreme Court just 5 days prior, on December 21,

2021. Of course, the deadline to file was not only immediately after the attorney of record was suspended, but also at Christmas.

Appellant had no notice of losing his lawyer's representation until January (this is not disputed), and rather than doing nothing about it, he rapidly prepared his own *pro se* Notice of Appeal, with no legal education and no new lawyer, and he filed his Notice of Appeal *pro se*, on January 10, 2022. Appellant was a total of 15 days late in filing his Notice of Appeal, and it was entirely due to his lawyer's malfeasance on other cases that left the Appellant 'high and dry' and without representation while having absolutely no idea that was the case until it was too late, at which point he leapt into action to file on his behalf.

It is critical that this honorable Court recall that this case involves the Appellant having been stripped of a possible $4 million share of his father's estate, which he once had been entitled to and which he challenges entitlement to now, alleging malfeasance against his brothers as well as a lack of legal capacity upon his father's change of will. The gravity of this case is monumental!

Under the circumstances of Shoemaker's counsel of record being disbarred at the deadline time, Christmas time, and without the Appellant even knowing, if EVER there were a case of good cause being shown where an appeal should be reinstated, this is this case. In fact, the Appellant should be granted both the grace and credit for being aware at least enough to act quickly and procedurally accurately in filing his Notice as soon as he discovered he had been abandoned by a suspended attorney and having received no notice from the clerk of court, which was required to tell him of his dismissal status, who had been accused of severe matters and stripped of his ability to practice law.

Marshall Shoemaker should not lose his one and only opportunity to proceed to fight for his legal rights under some circumstances, and the Lower Court failed in not considering the opportunity for appeal reinstatement in the showing of good cause. Marshall Shoemaker is a textbook scenario of good cause for such reinstatement, and Appellant thus argues that dismissal was erroneous in both law and equity by the Lower Court 1) failing to even consider Rule 260, and 2) failing to give good cause even the slightest consideration.

Even if the Lower Court's specific ruling didn't patently violate the law, under Rule 260(a), the Clerk should have dismissed the appeal as untimely without any further effort on either party. However, that never occurred. Instead, Respondents filed a motion to dismiss the appeal, and as of the date of the appeal hearing, it had never been dismissed.

Had the appeal been dismissed by the Clerk as dictated by Rule, upon receipt of the Order of Dismissal of the Appeal, the Appellant would have then had 15 days to file a motion to reinstate the appeal with the appropriate appellate court, and he would have been rquired to be provided notice of both the dismissal by the clerk as well as his rights to file for reinstatement based on good cause. Yet he was denied this right because the court systemically failed this Appellant, denying him rights guaranteed to him by Rule 260 SCACR to petition for such reinstatement and provide his evidence of good cause for reinstatement.

Mr. Shoemaker should have received a clerk's notice of dismissal with notice that he could petition for reinstatement within 15 days. That did not occur and that fact is not disputed.. Had Mr. Shoemaker been granted due process according to court rules, also per Rule 260(a) SCACR, the appellate Court (in this case, the Circuit Court) would have looked ONLY to whether Mr. Shoemaker could show good cause for reinstatement. In fact, as the transcript reveals, Mr. Shoemaker offered a great deal of undisputed evidence to show good cause, but the

Lower Court never addressed any right to a good cause analysis, but instead ignored the failure of the system to follow Rule 260 and simply dismissed his case without any regard for a showing of good cause. For all of those reasons, the Lower Court's dismissal of the case under S.C. Code section 62-1-308(a) without any allowance for Appellant to petition for reinstatement under Rule 260 SCACR is required to be reversed.

It is thus clear that the law provides a mechanism by which a missed deadline, on its own, may not be fatal to the appeal in this matter..

Were the Court to issue an Order of Dismissal at this time, the Appellant would then have 15 days to file a Motion to Reinstate and come before the Circuit Court to make his case for reinstatement based upon good cause shown under Rule 260(a). If the Court granted such reinstatement and good cause was shown, then the Appeal would then likely be reinstated by le

In keeping with the clear purpose and spirt of Rule 260(a), Lower Court would have only been considering whether Mr. Shoemaker, the Appellant, could demonstrate good cause to reinstate the Appeal based on the unique and unfortunately tragic facts stated above. Instead, however, the system tragically yet blatantly failed Mr. Shoemaker and in fact infringed upon his rights to due process.

The facts: Appellant's attorney was suspended/disbarred only 5 days prior to the appeal deadline; Appellant was not notified by his attorney or the Court; the clerk of court failed to automatically dismiss the appeal after 10 days passed as required by law; the clerk's failure to do so led to Shoemaker receiving no notice that he had 15 days to move to reinstate the appeal with a showing of good cause. Instead, Respondents filed an unnecessary motion and procedurally incorrect motion to dismiss the appeal; as such, Respondents then succeeded in achieving a

dismissal before a Lower Court jurist who refused to consider a good cause argument to allow Mr. Shoemaker's appeal despite his legal right to have an opportunity to so prove (please Note that nowhere in the Lower Court's order is an absence of good cause found – the Court simply applied a strict 10 day rule, and that application is absolutely contrary to the Appellate Court Rule 260. The decision must be reversed as the process and analysis was so fatally flawed that the ends of justice, fairness, and Mr. Shoemaker's rights were trampled upon.

2. **The Lower Court erred in affirming the Probate Court's grant of summary judgment, and was required to reverse the Probate Court's grant of summary judgment because of the following:**

   A. **The Lower Court erred in failing to reverse the Probate Court's summary judgment grant under Canon 3(E)(1) when the Probate Judge was co-counsel with Respondent's law firm on another case, benefitting monetarily from billings with the Respondent's law firm; and where the the Judge failed to disclose his pecuniary interest with Respondent's firm until almost 6 months after granting that firm its summary judgment motion against the Appellant;**

   B. **the Lower Court erred in failing to rule that the Probate Judge which granted summary judgment engaged in impropriety or failed to avoid the appearance of impropriety under Canon 2(A) and 2(B) by failing to disqualify himself due to a shared pecuniary interest with Appellant's opposing law firm serving as co-counsel in a civil case; and**

   C. **the Lower Court erred in not ruling that the Probate Judge failed to follow remittal requirements of Canon 3(F) by not disclosing to the parties his relationship with the firm of Brown, Massey, McLeod, Evans & Haynsworth until almost 6 months after having granted that firm's summary judgment motion against the Appellant.**

The argument herein addresses subparts (A), (B), and (C) together as they are inextricably intertwined. The specific subparts above are separated above merely to recognize the 3 precise issues that require the Lower Court's decision to be reversed.

To summarize the argument which follows herein, it may be itemized factually as follows. These facts are not in dispute and are the facts presented to the Circuit Court from which it faulty ruling and which should be reversed by the Court of Appeals:

A. The Probate Judge that granted Respondents summary judgment was engaged in a co-counsel relationship with the Respondents law firm;

B. Many months after granting summary judgment to his co-counsel's client (Respondent), he admitted that he would be benefitting financially from his relationship with the Respondent's law firm;

C. The Probate Judge's grant of a dispositive summary judgment to his co-counsel firm (Respondents' firm) resulted in a complete "victory" for his co-counsel firm, worth approximately $4 million dollars to Respondents in the overall estate dispute;

D. That Probate Judge not only failed to recuse himself as a matter of law despite his pecuniary relationship with the Respondents' firm, he didn't even recuse himself to avoid the appearance of impropriety despite such financial/co-counsel relationship;

E. That Probate Judge failed to disclose to the Appellant before or at the summary judgment hearing that he had a mutually financially-beneficial and co-counsel relationship with the Respondent's lawyers;

F. That Probate Judge only revealed his relationship with the Respondents' lawyers after the Respondents' lawyers moved to have the same judge award them over $100,000 in legal fees.

G. Shortly after this disclosure and a further motion by Appellant for that Probate Judge to vacate pervious Orders and recuse himself, the Supreme Court of South Carolina, in a rare intervention, took jurisdiction away from Greenville County entirely and appointed a new Probate Judge from Cherokee County to preside over all further matters involving the estate in dispute.

Under Canon 3(C), a judge should disqualify himself if his impartiality might reasonably be questioned. "In cases involving a violation of Canon 3, **this Court will affirm a trial judge's failure to disqualify himself only if there is no evidence of judicial prejudice**." Ellis v. Procter and Gamble Distributing Co,. 433 S.E.2d 856, 315 S.C. 283 (S.C., 1993)(emphasis added); see Rogers v. Wilkins, 275 S.C. 28, 267 S.E.2d 86 (1980); see also Reading v. Ball, 291 S.C. 492, 354 S.E.2d 397 (Ct.App.1987); Payne v. Holiday Towers, Inc., 283 S.C. 210, 321 S.E.2d 179 (Ct.App.1984); Lyvers v. Lyvers, 280 S.C. 361, 312 S.E.2d 724 (Ct.App.1984). Stated another way, this Court must reverse Judge Jennings' failure to disqualify himself if there is any evidence of prejudice." In the present case, it is difficult to imagine a factual situation that could be clearer in demonstrating judicial prejudice under an "any evidence" standard, which is a very low threshold to meet in order to reverse a lower court's rulings resulting in the face of such canonical violations.

Canon 2 of the Code of Judicial Conduct is unequivocal: "A Judge shall avoid impropriety and the appearance of impropriety in all of the Judge's activities." Rule 501, SCACR. Further, Canon 2(A) states, "A judge...shall act at all times in a manner that promotes public confidence in the...impartiality of the judiciary." Rule 501, SCACR. "The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception

that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired." Rule 501, Canon 2(A), Commentary, SCACR.

The Probate Court unequivocally and obviously violated this Canon, best illustrated by a simple chronological recounting of events, and the Circuit Court's failure to so find requires reversing the Circuit Court's upholding the Probate Judge's actions. With the Circuit court finding no impropriety and affirming the Probate Court's actions and decisions, the Lower Court essentially placed a stamp of approval upon a Judge granting victory to a firm with whom he has a pecuniary relationship despite the fact that the Probate Judge didn't even follow the most minimal remittal (disclosure) procedures, and all while leaving the opposing party ignorant to the conflict of interest between the Judge and the opposing counsel (Respondents). In fact, the Order of the Lower Court found the importance of the Judicial Canons to be so minor as to address them as little more than a footnote at the conclusion of its ruling, with absolutely no analysis nor concern.

As the following chronology of undisputed facts reveals, such a 'stamp of approval' given by the Lower Court of this conduct is contrary to every most important Judicial Canon, doctrines which uphold the integrity and impartiality of the judiciary, doctrines which protect against purposeful (corrupt) partiality, or unintentional partiality or the appearance of impropriety, even if unintentional; doctrines which are absolutely necessary to the integrity and continued honorable functioning of the American Judicial branch of government. One cannot stress enough the importance of this issue in both single case practice and in greater precedential importance. The Lower Court's ruling created a slippery slope indeed, and that must be corrected. Regardless, the importance of this issue cannot be overstated, as it is fundamental to the entirety of a proper functioning judiciary of integrity and fairness.

1. April 7, 2021

    a. Judge Jennings entered a co-counsel relationship with the Brown, Massey law firm on two cases.

    b. Judge Jennings heard a dispositive motion (summary judgment) made by the Brown, Massey firm against Appellant involving a disputed multi-million-dollar estate;

    c. Judge Jennings failed to make any disclosure to the parties of the business relationship he has entered with Appellant's opposing counsel.

2. June 15, 2021 – Judge Jennings granted Brown, Massey, Evans, McLeod & Haynsworth's Motion for Summary Judgment, thus determining victory for his co-counsel's clients as a matter of law, ending the Appellant's case (subject to any appeals).

3. September 15, 2021 – Brown, Massey, Evans, McLeod & Haynsworth seek an award of over $112,000 in attorney's fees and costs from Judge Jennings, who takes the motion under advisement.

4. September 16, 2021 – on this day, Judge Jennings disclosed his co-counsel relationship to Appellant and counsel. This day, September 16, 2021, was:

    a. 5 months and 8 days after having entered into a business/financial relationship as co-counsel in two cases with Brown, Massey, Evans, McLeod & Haynsworth;

    b. Over 3 months since granting Brown, Massey summary judgment against Appellant; and

c. 1 single day after having heard a motion from the Brown Massey firm seeking an award of over $112,000.00 in attorney's fees and costs.

5. October 1, 2021 – Appellant filed a Motion to Recuse and Vacate, requesting that Judge Jennings recuse himself from the case based on his relationship with Brown, Massey, Evans, McLeod & Haynsworth, LLC, and requested that all previous Orders be vacated (Summary Judgment) on the grounds that his relationship with Appellant's opposition would be a disqualifying relationship or give an appearance of impropriety; and the Judge's failure to disclose his relationship with the firm required the vacating of such Orders and recusal.
6. December 15, 2021 – Judge Jennings issued an Order on Appellant's Motion to Vacate and Recuse.
    a. The Judge granted the Motion to Recuse; and
    b. denied the Motion to Vacate all prior Orders.

A judge MUST avoid the appearance of impropriety – this is mandatory, and every jurist knows this as a matter of his and her daily duties to the public; that is, it is of highest and most important of judicial obligations. The Preamble to the Code of Judicial Conduct states as follows: "When the text uses "shall" or "shall not," it is intended to impose binding obligations the violation of which can result in disciplinary action. Rule 501, Preamble, SCACR. The Preamble then follows with the consequential meanings of "should" and "may," each term having less and less binding characteristics. "Shall" language in the Code is the only term of mandate that results in disciplinary action. It imposes the *highest* standard upon the judiciary. Being the highest of all standards applied to the judiciary, it merits the most careful review by

this Court, with substantial importance placed upon the test to be applied in answering this question:

This begs the question: could a judge who maintained a relationship with a law firm practicing before him in a dispositive motion worth essentially $4 million, a law firm with whom the judge shared an ongoing and pecuniary beneficial co-counsel relationship – could this relationship create in **reasonable minds** a **perception** that the Judge's ability to carry out his judicial duties with impartiality was impaired? Appellant submits the answer to be a resounding YES. In fact, Appellant begs this Court to consider how the question could possibly have a contrary answer in this situation of facts. A reasonable mind could only perceive that two parties with aligned interests and pecuniary gain MIGHT have either intentional or unintentional bias or prejudice to a third party (the Appellant in this case). The question is not one of the perception of the judge himself, but rather than perception of the party litigants, who are the most important and vulnerable within the legal system and whose rights the system is designed to protect in due process, procedural fairness, and judicial impartiality, hopefully beyond reproach. And that is precisely why the Canons exist.

The Probate Court's violation and error is further illustrated in the court's language, which the Circuit Court later essentially approved by finding nothing wrong with the Probate Court's conduct, and essentially failing to even address its importance in this case (or in all cases). In his December 15, 2021 Order, the Probate Judge stated as follows:

1. "I filed a notice of appearance on April 7, 2021 [as co-counsel with Stanley McLeod], in anticipation of having to appear at a motion hearing on the following day, but co-counsel (Stanley McLeod) appeared at the hearing, and my service was not needed, and I did not appear in court; I have received no retainer or fee in connection with my

representation; I have not appeared at any hearing or proceedings; and I have not billed or recorded any time for my representation, and my representation is not subject to a contingency fee agreement. However, I anticipate that I will need to spend time on the cases...at some point in the coming months." (Exhibit H, page 2). A careful review of this paragraph indicates several key facts:

a. On April 7, the day of the summary judgment hearing where he ruled in favor of Respondents (again, approximately a $4 million dollar win to that firm), Judge Jennings, had on the very same day filed his notice of appearance as co-counsel with the Respondents' counsel of record. He disclosed nothing to the opposition, did not even consider recusal, and proceeding with the summary judgment hearing with his co-counsel arguing before him to the ignorance of Appellant and his attorney.

b. The reason Judge Jennings filed the notice on April 7 was because there was a hearing on April 8, and as of April 7, Judge Jennings expected to be participating in that hearing with Stanley McLeod as co-counsel.

c. Judge Jennings did not know on April 7 that he was not going to have to appear at the hearing on April 8; he was planning on working WITH the Brown Massey firm 1 day after the summary judgment hearing that he heard on April 7. It was only on April 8 that he learned he didn't need to attend the hearing.

d. Judge Jennings' basis for his nondisclosure was the fact that he hadn't been paid or billed anything on the case(s) he shared with Brown, Massey, Evans, McLeod & Haynsworth law firm. However, on April 7, he filed a notice of

appearance with full expectation of arguing a hearing the next day in that case (presumably getting paid); but more importantly, he states clearly in the Order that he anticipated "spending time" (presumably compensated time) in the coming months.

e. In this paragraph, Judge Jennings essentially draws his conclusion that "since I hadn't billed any time or been paid any money," I didn't need to disclose the co-counsel relationship with the Appellant's opposing firm. Note that Judge Jennings at no time stated his co-counsel relationship was to be pro bono, and even if it were, nothing in the Judicial Canons requires a monetary relationship as the basis for recusal or avoiding the appearance of impropriety. The fact is that the Probate Judge was in bed with the Respondents' counsel, working together on a brand new case that would ultimately benefit them both in a pecuniary fashion. How could any judge have NOT been reasonable perceived to be operating under a conflict and with partiality against the Appellant in this case?

Even if the Probate Judge's failure to disclose was unintentional, or if he did in fact consider disclosure and decided against it, these facts do not relieve one of the Canon's requirements. Nothing in the Code of Judicial Conduct states that the appearance of impropriety would only exist if a judge has received money in a relationship or accidentally violated the Code. Certainly, receipt of funds within a co-counsel relationship would add to an appearance of impropriety, but the absence of money changing hands does not eliminate it under Canon 2. Still, Judge Jennings clearly states that when he signed on as co-counsel on the same day as the Appellant's hearing against the Judge's co-counsel, he was expecting to do paid work the very

next day; it was mere coincidence that the hearing became unnecessary for him to attend. He also recognized he anticipated getting paid in the future. Therefore, on April 7, 2021, Judge Jennings, in his own words, knew that he was in a co-counsel relationship with Appellant's opposing law firm on two cases in which he would work with that firm and be paid for his co-counsel role in those cases. And even with this knowledge, he did not disclose the relationship to Appellant and counsel prior to the hearing. Instead, he granted summary judgment and disclosed the relationship almost 6 months later.

Despite all of the above facts being on the record and having been considered by the Circuit Court on appeal, the Circuit Court found Appellant's arguments unpersuasive and seemed to disregard the keystone importance of the Canons and the actual or appearance of impropriety in the carrying out of judicial duties. This Court should recognize that absolutely any decision coming from a judge operating under a mandatory recusal situation, or at least a mandatory remittal situation, that any Orders that would issue therefore in the absence of recusal would be civil version of the doctrine of "fruit of the poisonous tree," and none should stand. These parties must have a jurist with no potential conflict, no potential of impropriety, to hear every portion of this case. In fact, Chief Justice Beatty seemed to quite agree given the fact that he thereafter took all jurisdiction from Greenville County probate judges as a while and made a special appointment of a Cherokee County Probate Judge to assure no appearance of impropriety or actual impropriety.

Judge Jennings further stated, language that appeared to have no bearing upon the Circuit Court which is now appealed: "I disclosed my representation [September 16, 2021] only after it occurred to me that my co-counsel on these cases was in practice with Attorney Haynsworth,

who represents the respondents in this matter. This disclosure was to demonstrate sensitivity to assuaging any concerns about my impartiality." (Exhibit H, page 2).

A review of these statements calls into question several issues. First, the Order states that the Judge was not aware until September 16, 2021, that Stanley McLeod and Knox Haynsworth practiced law together. Even if that were true, every filing made on behalf of the Respondents clearly is signed by Knox Haynsworth directly underneath the firm name, which is always in bold print and all caps, and shares the names HAYNSWORTH AND MCLEOD right next to each other. (See, e.g., Exhibit F, Exhibit J). Exhibit A, the transcript from the summary judgment hearing, filed May 19, 2021 (before Judge Jennings' Order granting summary judgment), clearly indicates that Knox Haynsworth III, of Brown, Massey, Evans, McLeod & Haynsworth, LLC was appearing, and indeed Judge Jennings refers to Mr. Haynsworth in the introductions in stating "The Respondents are represented by Knox Haynsworth III." (Exhibit A, p. 3, ln 14-15). Also, though the record does not reflect this, the author of this brief is keenly aware that there are very few civil attorneys within this County Bar that are not keenly aware that Knox Haynsworth and Stanley McLeod are law partners. They are well known, as is their firm, and they have been partners for decades.

More importantly, however, is that the statement above also indicates the motive of the Judge's disclosure about his relationship to the firm was to "demonstrate sensitivity to assuaging any concerns about my impartiality." If Judge Jennings believed that disclosure of this relationship per Canon 3(F) were necessary (Remittal of Disqualification), as he stated herein, then it follows that his relationship was an event of Disqualification under Canon 3(E), wherein "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned...." Let us review that again in simplicity: Judge Jennings'

ultimate disclosure months after he SHOULD have disclosed his relationship clearly showed that he recognized a person might reasonably question the propriety of the relationship. And if he felt as he clearly stated, then it de facto a violation of Canon 3(e). By the judge's own words, he violated the Canon. Yet, the Lower appellate Court again paid no attention to this in its short paragraph footnote of dismissiveness of this most important inquiry.

By Judge Jennings stating in his December Order that his September 16 email disclosure was to assuage concerns about impartiality, Judge Jennings essentially admitted that his impartiality might reasonably have been questioned. And under Canon 3(E), a Judge shall disqualify himself in such instance. Therefore, Judge Jennings was required to disqualify himself in the September email itself. His disclosure of the relationship would only be utilized by the parties to determine whether to waive his disqualification. Rule 501, Canon 3(F), SCACR. Instead, on the same day (December 15, 2021) that he refused to Vacate his summary judgment Orders, the Judge did two things: 1) issued an Amended Order Granting Summary Judgment (months after the September email and without a waiver of disqualification by the parties), and 2) recused himself from any further involvement in the cases.

This begs the question - why recuse oneself and not vacate prior Orders when the reason the judge recuses himself is exactly due to facts (a direct Canonical violation) that existed at the April 7, 2021 summary judgment hearing which resulted in a multi-million dollar dispositive victory for the judge's co-counsel – all without Appellant or his counsel having any knowledge. Judge Jennings recused himself upon granting Appellant's motion on December 15, 2021. However, the appearance of impropriety upon which he based his recusal existed on April 7, 2021 when he joined forces as co-counsel in two civil cases with Appellant's opposition. Had Appellant known the Judge's relationship existed with the opposing counsel on April 7, 2021,

the Appellant certainly would have moved for recusal at that time. But the Appellant knew nothing of the relationship because the Judge did not disclose it then, and not for almost six more months. And upon final disclosure, Appellant promptly filed for recusal and for vacating of all Orders back to the time where the disqualifying event occurred.

Opposition may argue that no disqualifying event occurred and that the Judge Jennings sufficiently satisfied the mandate of Canon 2 to avoid the appearance of impropriety. In so doing, however, opposing counsel cannot escape the simplicity of the test that applies in both the impropriety analysis under Canon 2 and the Disqualification test of Canon 3. Both are reasonableness tests. Both simply require the answer to whether a judge's impartiality might reasonably be questioned. Rule 501, Canons 2 and 3, SCACR. And again, the inquiry is not whether another judge might question impartiality, nor whether a lawyer might question it, it is merely whether impartiality reasonably be questioned, which includes the laypersons who are the people whose very important life issues are the things at risk in these cases. For judges and lawyers, they are doing their 'jobs'. The party litigants are fighting for incredibly issue that directly affect their lives, their business, their families, their finances – they are who our system protects. They are the reason the Canons matter so very much. They are why the bar and bench must strive for compliance with their respective rules of governance at all times. And when there is failure to so comply, it is the advocates' and the jurists' jobs to right those wrongs for the party litigants to protect the goals of fairness, impartiality, due process, and integrity.

What's even more informative to this Court's inquiry is the Commentary of Canon 3(E)(1), which states as follows:

"Under this rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific rules in Section 3(E)1 apply.

For example, if a judge were in the process of negotiating for employment with a law firm, the judge would be disqualified from any matters in which that law firm appeared, unless the disqualification was waived by the parties after disclosure by the judge." Rule 501, Commentary to Canon 3(E)1, SCACR. The Commentary continues: A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification." Id.

In the present case, Judge Jennings granted the Motion to Recuse, thus admitting impartiality might reasonably be questioned and to avoid the appearance of impropriety. If it were otherwise, then Judge Jennings would not have been allowed to recuse himself, because just as judge has a duty of recusal or disqualification is necessary (as in this case), a judge also has an affirmative duty to sit for a case if he/she is not disqualified.

There are three decisive facts which should be the simple focus of this Court:

1. Judge Jennings' disqualification by necessity under Canon 3(E)(1) or by avoidance of appearance of impropriety under Canon 2 would be attributable to the relationship of co-counsel between Judge Jennings and the Appellant's opposing law firm.
2. That relationship existed on April 7, 2021, the same day Judge Jennings heard the summary judgment motion he would ultimately grant.
3. Judge Jennings recognized that disqualification was either required or prudent by recusing himself on December 15, 2021, and the Chief Justice of the South Carolina Supreme Court, in a highly unusual injection into a case, also recognized this by issuing an Order disqualifying the entire Greenville County bench from this case and

making a special appointment of a Cherokee County probate judge for the remainder of the Shoemaker cases. (Exhibit I).

Given these three undisputed facts, it necessarily means that Judge Jennings recognized recusal as appropriate after the issue was formally raised by Appellant, but because his Order of December 15, 2021 did not vacate his previous Orders (in fact, he recused himself and issued a new grant of summary judgment on the same day!) - this implies that he believed recusal was not appropriate or necessary upon his hearing of the summary judgment motion on April 7, 2021 despite the fact that the same disqualifying relationship existed at that time.

The above examination and analysis make clear that Judge Jennings' relationship with Brown, Massey, Evans, McLeod & Haynsworth is a relationship which was either 1) a disqualifying relationship under Canon 3(E)(1), in which case Judge Jennings could only remain on the case if he made the required disclosures under Canon 3(F) (Remittal of Disqualification), AND the parties, after such disclosure, consented to waive the disqualification. Alternatively, Judge Jennings' relationship with the opposing firm created an appearance of impropriety (as indicated by Jennings' ultimate recusal), and under Canon 2, a judge 'shall' avoid the appearance of impropriety, which is precisely why Jennings recused himself.

Because Jennings recused himself to avoid the appearance of impropriety, and because the same facts giving rise to that appearance of impropriety existed on April 7, Judge Jennings erred in failing to Vacate his prior Orders because all such orders would have been made during the time that the disqualifying/potentially improper relationship existed. Had Judge Jennings both recused himself and vacated his prior Orders, any and all concerns of judicial integrity and impartiality would have been eliminated. Instead, by leaving his grant of summary judgment in place, Judge Jennings only created much greater concerns of partiality and much greater

appearance of impropriety under the reasonable minds test of Canon 2 (even unintentionally). Judge Jennings operated under a disqualifying relationship without any disclosure to the Appellant, made a ruling which was a complete victory for the firm with which he had an outside co-counsel relationship, and ended the Appellant's case, prior to disclosing his relationship with the firm.[1]

2. **The Court erred as a matter of law in granting summary judgment because Dr. Thomas Hughes' affidavit created a dispute of material fact about the testator's mental capacity.**

When ruling on a motion for summary judgment, "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury

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[1] Numerous Judicial Ethics Advisory Opinions address recusal/disqualification, and several are here listed for reference to demonstrate that far more disinterested/distant relationships are deemed either disqualifying or creating an appearance of impropriety requiring recusal.

In certain cases, a judge's collaboration with several related state agency representatives may create an appearance of impropriety. (See Advisory Opinion 5-2001 discussing the impropriety of a family court judge also acting as a fellow of the South Carolina Chapter of the American Academy of Matrimonial Lawyers).

OPINION NO. 04-2003 (South Carolina Judicial Ethics Advisory Opinions, 2003). In Opinion 10-2011, this Committee considered Canon 3E in determining the propriety of a Circuit Court Judge presiding where the law clerk's uncle was the senior prosecuting solicitor. We determined that while such a relationship could create the appearance of impropriety, this appearance of impropriety does not exist for uncontested and default matters, and thus the possibility of disqualification only arose in contested cases. However, we also found that disqualification was not automatically required in all contested cases and found that the judge could utilize the remittal procedure to avoid the appearance of impropriety.

OPINION NO. 1-2015 (South Carolina Judicial Ethics Advisory Opinions, 2015) Canon 3.E.(1)(d) does not require disqualification even if the judge's law clerk is not prevented from working on the case. However, the judge must still avoid the appearance of impropriety and act in a manner to promote the public's confidence in the integrity and impartiality of the judiciary as required by Canons 1 and 2. Thus, in matters such as contested motions or trials in which the solicitor/uncle appears (and assuming the judge has not required his law clerk to abstain from involvement), the judge must full disclose the relationship of the judge's clerk and the solicitor.

OPINION NO. 10- 2011 (South Carolina Judicial Ethics Advisory Opinions, 2011)

functions, not those of a judge..." Anderson v. Liberty Lobby, Inc, 477 U.S. 242, (1986). "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Id.

At the April 7, 2021 summary judgment hearing, the Probate Court considered an affidavit submitted by Appellant of Dr. Thomas Hughes, M.D., who opined upon the decedent testator's mental capacity as it pertained to his legal competency to execute testamentary documents. (Exhibit K). In its Amended Order Granting Summary Judgment (Exhibit E), the Court concluded that Appellant's affidavit of Dr. Hughes did not create a dispute of material fact. The Court's statement, however, does make it so. Upon reading the Court's Order, it is clear that Judge Jennings acted in the capacity of fact finder. In fact, the Court goes so far as to unabashedly discredit the affidavit as the physician. The Court also imposed upon the Appellant requirements for an affidavit that are unsupported by the law.

In pertinent part, on page 5 of its Order, the Probate Court stated that Dr. Hughes only reviewed medical records of the decedent and didn't personally examine Mr. Shoemaker. While that is a true statement, the Court implied that reviewing medical records is legally insufficient for forming any medical opinion about a patient's medical condition. Such reasoning is absurd, because if that were so, it would be virtually impossible for any beneficiary of an estate to question the capacity of a decedent post-mortem. It would also render most medical malpractice cases impossible, given that such cases are based almost entirely upon medical experts reviewing medical records. Such a rule would ultimately render medical records useless and make expert witnesses in health matters non-existent and create a reality where only treating physicians had a right to opine on a patient's medical condition. Despite that, the lower Court essentially stated

that because this Doctor only reviewed records post-mortem and wasn't treating him while alive, then his affidavit was factually useless.

This case revolves entirely around whether the testator had the legal capacity to execute certain testamentary documents. As such, the MOST critical fact for the jury to determine, after being charged with the law, is, "did Mr. Shoemaker have the legal capacity." Certainly, medical records, and the interpretation and opinions of such records, of treating physicians or opposing physicians/expert witnesses, all of these go directly to not on a dispute of material fact, but THE material fact that largely may determine the outcome of the case. Judge Jennings acted as a juror in his Order – he decided on his own the amount of weight or credibility to put into Dr. Hughes' affidavit. Certainly, the opposition might attack the reliability, credibility, or relative weight to place upon the doctor's testimony at a trial on the issue, but it is not for the Court to do such things. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge..." Anderson v. Liberty Lobby, *Inc,* 477 U.S. 242, (1986). "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* For summary judgment then, the law could not be clearer. Because a physician reviewing the records of the decedent opined as to the absence of necessary legal capacity, the probate judge was required to view such affidavit in a light most favorable to the Appellant. Had he done so, the law required Judge Jennings to find that the most critical fact, the most material fact in the case, was in fact in dispute and that the moving party could NOT be entitled to judgment as a matter of law. Instead, Judge Jennings, working under a conflict of interest as co-counsel with the appellants in another case which should have required recusal, ruled in favor of the Respondents based on his own personal weighing of the evidence and credibility of the Appellant's physician affidavit going directly to the central fact in

dispute. It is difficult to craft a fact scenario that is any more clear: 1) A party presented evidence of a physician's opinion as to legal capacity of the decedent; 2) legal capacity is the single greatest material fact in dispute in the case; and 3) the Probate Judge, in direct contravention of one of the most common and well known standards of review in civil law, took on the role of juror and assigned his own weight and credibility of the evidence to rule that there was no material dispute of fact. The legal error requiring reversal here is patent. Simply put, a judge did a juror's job in a summary judgment motion, and essentially found or assigned weight to factual evidence, when the Court's only role is to view all evidence in a light most favorable to the non-moving party (Appellant) and determine if there is any material fact in dispute. Applying that standard, Judge Jennings had only one proper ruling – summary judgment had to be denied. He could only have granted it if viewing all evidence in a light most favorable to the Appellant, if there was 1) NO dispute of material fact, and 2) having determined there was no dispute of material fact, the Court must also find that the moving party is entitled to judgment as a matter of law. Both elements must be present, and in such analysis, the judge cannot serve as the arbiter of facts. This point is as prescient as any could be in this most important and most consequential of all civil motions, and the standard must be upheld and preserved so that trial judges are not 'trying' cases at summary judgment, which is precisely what Judge Jennings did here, at least as it pertained to the Appellant's physician-submitted affidavit challenging the decedent's testamentary capacity based upon his medical review.

The Court further states that in order to survive summary judgment, Dr. Hughes was required to employ certain magic language in his affidavit. The Court indicated that Dr. Hughes "...failed to conclude that Mr. Shoemaker did not know his estate, know the objects of his affection and know to whom he wished to give his property...." The Court cites Hellams v.

Ross, 233 S.E.2d 98, 100 (S.Ct. 1977) for this proposition. While it is true that a jury must apply this test when determining a testator's capacity, Hellams does not require that a supporting affidavit in a summary judgment motion use those specific words. Dr. Hughes testified that there was evidence of cognitive impairment and that Mr. Shoemaker lacked the requisite mental capacity. (Paragraph 8 to Dr. Hughes' affidavit – Exhibit K). In fact, Dr. Hughes affidavit is replete with commentary on his records review, his qualifications, and his opinion about Mr. Shoemaker's lack of requisite mental capacity. The Court had an obligation to view all evidence in a light most favorable to the Appellant, the non-moving party. The Court had an obligation to take the affidavit allegations as true for purposes of this motion. Mr. Shoemaker's mental capacity is the most material fact in the case, and determining that ultimate fact requires determinations of many other material facts which would involve medical records and their interpretations and inferences to be drawn therefrom – all facts that are addressed in Dr. Hughes' affidavit.

The non-moving party does not bear the burden of proving his correctness in a summary judgment motion; his obligation is merely to present evidence of disputed material fact as the very rule itself recites. Dr. Hughes' affidavit specifically addressed medical records, specific references to findings in those records and interpretations thereof, and opinion that Mr. Shoemaker had substantial cognitive impairment and may have lacked the mental capacity to make a new will. (Exhibit K).

Under the standard as so succinctly and accurately set forth by the Supreme Court, Respondents' motion should have been denied and these critical issues held over for a fact finder after consideration and deliberation over all evidence presented at a trial on the merits; therefore, the lower court's grant of summary judgment should be reversed.

When ruling on a motion for summary judgment, "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge..." Anderson v. Liberty Lobby, Inc, 477 U.S. 242, (1986). "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.*

At the April 7, 2021 summary judgment hearing, the Court considered an affidavit submitted by Appellant of Dr. Thomas Hughes, M.D., who opined upon the decedent testator's mental capacity. In its Order Granting Summary Judgment, the lower court concluded that Appellant's affidavit of Dr. Hughes did not create a dispute of material fact. This Court disagrees.

The lower court did not apply the appropriate standard of review for summary judgment motions. Rather, the lower court served as fact finder or at least as arbiter of credibility. In fact, the lower court went so far as to discredit the affidavit as the physician. In its findings, the lower Court addressed the fact that Dr. Hughes only reviewed medical records of the decedent and didn't examine Mr. Shoemaker. While this is a true statement, the court implied that reviewing medical records is somehow legally insufficient for forming any medical opinion.

There is no legal authority to support that ruling. Indeed, a review of medical records for purposes of forming opinions is commonplace among medical cases. At trial, the fact finder would be charged with the duty to choose what credibility or weight to such evidence, but doing so at a summary judgment hearing subject to the appropriate standard of review it is not for the Court. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge..." Anderson v. Liberty Lobby, Inc, 477 U.S. 242, (1986). "The evidence of the non-movant is to be believed, and all justifiable

inferences are to be drawn in his favor." Id. Therefore, the lower court's grant of summary judgment is reversed.

CONCLUSION

The procedural posture of this case is a bit odd because though it appeals the Order of the Circuit Court, a great deal hinges upon the Probate Court's Judicial Canon violations, simply because the Circuit Court essentially didn't even consider these matters important in her ultimate ruling. In fact, the Circuit Ruling essentially stated that a violation of a Canon didn't matter in this case if one existed, and nothing could be further from the truth. That is why addressing the effect of the violations at the Probate Court is so critical, because it brings to light the error of the Circuit Court in failing to find any possibility that a Canonical violation could render the Probate Judge's rulings to lack impartiality, to be fair, and to be able to upheld as valid in light of the clear and active rulings in the face of actual conflict and shared pecuniary interest with a party who was granted victory at a dispositive motion (which shouldn't have been granted under the Summary Judgment standard as argued above).

Judge Jennings, on April 7, 2021, should have disqualified himself under Canon 3(E)(1), or recused himself in a timely manner to avoid the appearance of impropriety. He did neither – and the Respondent's won their case. The Appellant never had a fair opportunity to address the disqualifying event or appearance of impropriety. The opportunity came far too late. Summary judgment was granted to the Respondents' firm with whom Judge Jennings was working as co-counsel on two cases. Even though the appearance of impropriety or a disqualifying situation existed as of April 7, 2021, Judge Jennings refused to vacate his previous Orders, essentially making his recusal meaningless for the Appellant. This is not to impugn the judge's integrity, but only the integrity of the case. Absent Judge Jennings vacating his prior Orders, this case was

irreparably compromised from April 7 forward because the Appellant was uninformed of the relationship between the Judge and opposing firm.

Such relationships that create perceived or actual prejudices are dangers the Judicial Canons are specifically designed to prevent or avoid, and it is why they mandate certain actions of Judges in situations where impartiality may reasonably be questioned. Therefore, for all of the above reasons, the Lower Court's affirmation of the Probate Court's grant of summary judgment was erroneous as a matter of law and must be reversed, the summary judgment grant reversed and/or vacated, and remanded to Probate Court to the Supreme Court appointed special Probate Judge Queen in Cherokee County to hear the summary judgment motion again, not only as a Judge with no Canonical violations regarding recusal, but also to employ the appropriate standard for a Rule 56 motion.

The Lower Court's ruling must be reversed because it flies in the face of the Judicial Canons which required the Probate Judge to recuse himself prior to hearing the Respondents' summary judgment or engaging in remittal/disclosure, and even if he inadvertently failed to do so, when it became known of his direct conflict of interest and impropriety of presiding, the Probate Judge was required under the Canons to vacate all previous Orders and recuse himself, remanding the case for further proceedings with an impartial Judge clear of any Canonical prohibitions or impairments to service.

Moreover, the Lower Court's affirmation of the Probate Court's grant of summary judgment was legal error because it affirmed a Probate Judge applying the wrong legal standard and being a factfinder at a summary judgment hearing and failing to recognize a critical and obvious material fact in dispute upon the mere existing of contradictory affidavits by physicians

on the most critical and dispositive fact in the case, which was a fact for a jury to decide, not the Judge at a summary judgment hearing under the long-standing and unflinching legal standard to be applied. And because of the Probate Judge's refusal to recuse himself (mandatory under the circumstances) and failure to engage in required Canonical remittal, and because he then conducted the hearing and inappropriately applied the law of summary judgment, the Lower Court erred in affirming the Probate Court based on untimeliness of appeal due to the fact that there would have been no appeal by the Appellant had the Probate Judge properly ruled on summary judgment under the correct standard, but more importantly, the fact that his Order should not have even existed because he had been barred by the Canons from even hearing the summary judgment motion in the first place (which would have negated any issue of an appeal, especially a timeliness concern of such appeal filing).

March 11, 2023

Respectfully submitted to this Honorable Court,

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Hon. Debra R. McCaslin, Circuit Judge

RECEIVED
MAR 14 2023
SC Court of Appeals

Case No. 2022-001655

IN THE MATTER OF James Marshall Shoemaker, Jr.....Decedent,

James Marshall Shoemaker, III.....Appellant,

v.

Lesley R. Moore, Esq. as Personal Representative and Trustee, and Edward Sloan Shoemaker and Jonathan Evans Shoemaker as Beneficiaries and as Individuals.....Respondents.

PROOF OF SERVICE

I hereby certify and offer proof of service that the Respondents were served Appellant's **Initial Brief** by hand delivery, pursuant to Rule 262, Rules of Appellate Practice, this 11th day of Marcn, 2023 to the following attorney of record:

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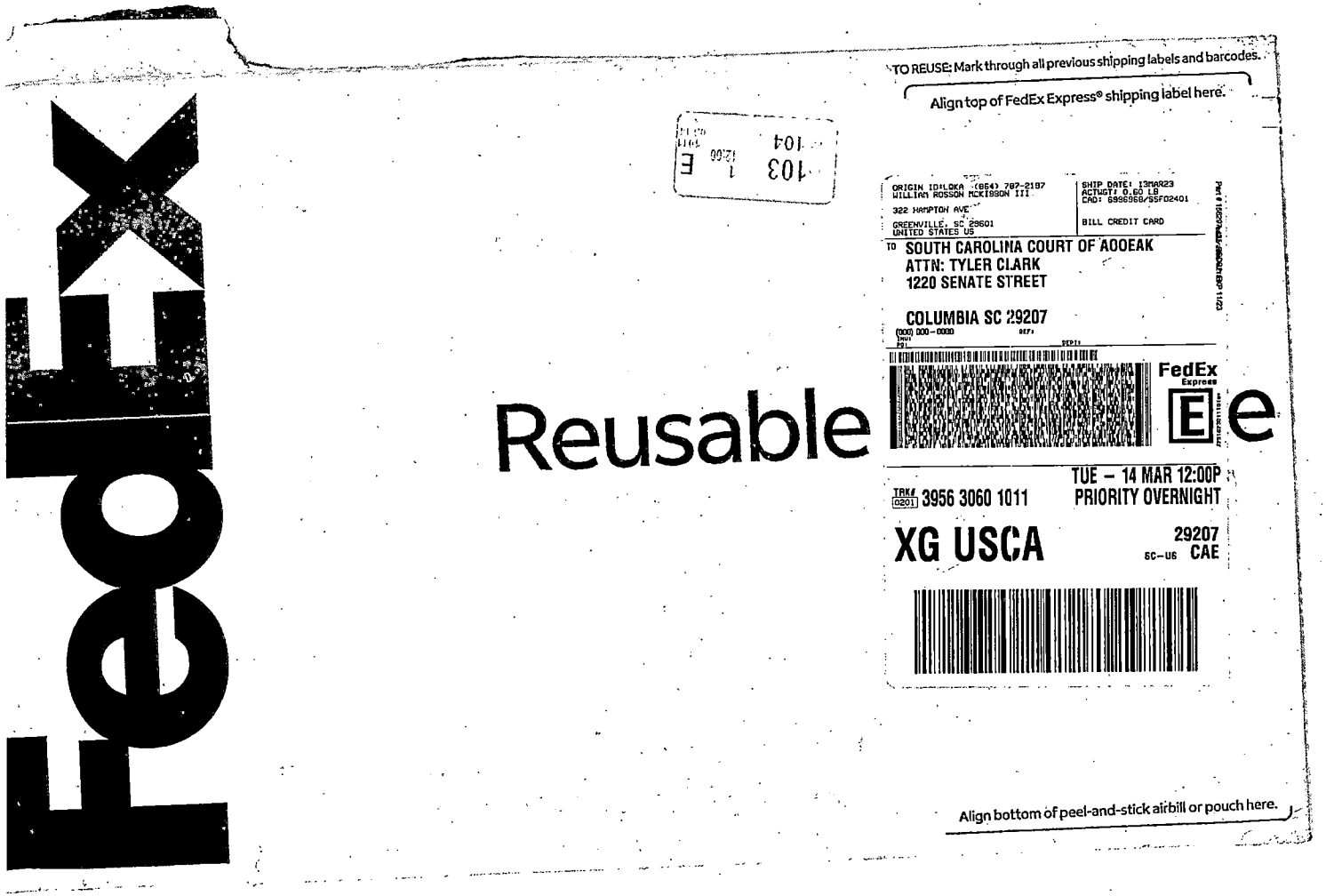
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